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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KENNETH MICHAEL MULLIGAN, Defendant and Appellant.	C068674 (Super. Ct. No. 09F00062)

Defendant Kenneth Michael Mulligan was convicted by jury of the first degree murder of Darrel Cadinha and found to have personally and intentionally discharged a firearm causing Cadinha's death. The trial court sentenced defendant to serve an aggregate term of 50 years to life in state prison (consecutive terms of 25 years to life for the murder and the firearm enhancement) and imposed other orders.

Defendant and Cadinha were rivals for the affection of Tami Niemeyer. There was no dispute that defendant shot Cadinha in the forehead when he discovered Cadinha alone in Niemeyer's bed. There was also no dispute Cadinha had a substance abuse problem and defendant believed he was using and dealing freebase cocaine in front of Niemeyer's two-year-old granddaughter, A.D., whom defendant considered to be part of

his family. The prosecution's theory was that defendant killed his sleeping rival out of jealousy and with premeditation.

Defendant claimed self-defense. He testified Cadinha threatened to cut his throat for reporting his drug use to Child Protective Services (CPS), prompting defendant to carry a loaded .38-caliber handgun for protection. The morning of the murder, defendant drove to Kurt Ures's house in Pollock Pines and picked up Christine Ures[1] (Niemeyer's daughter), Marques Almeida (Christine's boyfriend), A.D., and one of Christine's friends. When defendant and his passengers reached Niemeyer's mobile home, defendant walked inside to use the bathroom. He did not know Cadinha would be there. On the way to the bathroom, defendant noticed Niemeyer's bedroom door was slightly open and the lights were out in the room. According to defendant, he thought "maybe [Cadinha] was hiding out in there even though he wasn't supposed to be there." When defendant opened the door, he found Cadinha lying in bed watching television. Cadinha "started to rise up" from the bed and "his hand went to his waist." Believing Cadinha was reaching for one of the hunting knives Niemeyer kept by her bed, defendant "feared for [his] life and pulled the gun out and shot."

On appeal, defendant contends: (1) the trial court prejudicially erred and deprived him of his constitutional rights to a fair trial, to present a defense, and to due process of law, by excluding expert testimony concerning the effect the levels of methamphetamine and cocaine metabolite present in Cadinha's blood at the time of his death would have on an average person; (2) the trial court also prejudicially erred and violated his constitutional rights by instructing the jury with CALCRIM No. 3472 on the concept of contrived self-defense; (3) defendant's constitutional rights were further violated when the prosecutor, during closing argument, told the jury the coroner had concluded Cadinha

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[1] Because Kurt and Christine Ures share the same last name, we refer to them by their first names.

was "seemingly asleep" at the time defendant shot him in the forehead; and (4) the cumulative prejudice arising from the foregoing assertions of error requires reversal.

We disagree with each contention. As we explain, assuming the trial court should have allowed the proffered expert testimony, we find any error to have been harmless. The trial court did not err in instructing the jury with CALCRIM No. 3472. Nor did the prosecutor's comments during closing argument amount to prosecutorial misconduct. Defendant's assertion of cumulative prejudice also fails. We affirm the judgment.

FACTS

At the time of the murder, Niemeyer lived in a two-bedroom mobile home in Rancho Cordova with five other people: Niemeyer's daughter, Christine; Christine's daughter, A.D.; Christine's boyfriend, Almeida; and two other men, Joseph Wheeler and Joseph Rowland.

Defendant and Niemeyer began a romantic relationship sometime after December 2006, when Niemeyer injured her back. The two had been friends for several years and defendant "became a big help" to her following the injury. However, Niemeyer was still "infatuated" with Cadinha, a former lover whom she had known for over 20 years. Niemeyer told defendant if Cadinha came back into her life, she would go back to him. Defendant told her it "[l]ikely wouldn't happen." During this period of time, defendant lived with his sister and brother-in-law, but stayed with Niemeyer four days a week. Defendant spent "a good portion of [his] time" watching A.D., who was born in May 2006, and considered her to be part of his family.

In August or September 2008, defendant retrieved a .38-caliber semi-automatic handgun from his brother-in-law's safe and placed the gun beneath Niemeyer's dresser in her bedroom. According to defendant, the gun's purpose was to protect himself and Niemeyer from one of her ex-boyfriends.

In October 2008, Cadinha came back into Niemeyer's life. Cadinha had a substance abuse problem and asked for Niemeyer's help getting "back on his feet."

Niemeyer agreed and informed defendant she was resuming her relationship with him. Cadinha worked out of town during the week, but stayed with Niemeyer on the weekends. Defendant continued to stay with Niemeyer two or three nights during the week. Defendant and Niemeyer frequently argued about Cadinha. Niemeyer told defendant she loved Cadinha. Defendant responded that he was "heartbroken." He appeared to be jealous. Around this time, defendant claimed to have "witnessed [Cadinha] selling crack in the front room" of Niemeyer's mobile home. Defendant told Niemeyer about Cadinha's behavior, and also reported the incident to CPS and the police department. Niemeyer testified she never saw Cadinha using drugs in her home, but suspected he was doing so. According to defendant, toward the end of October, Cadinha called his cell phone several times and threatened to "cut [his] throat" for calling CPS, prompting defendant to retrieve the handgun from beneath Niemeyer's dresser and carry it for protection.

In November 2008, defendant found A.D. holding what he believed to be Cadinha's "crack pipe." Defendant was in the doorway to Niemeyer's bedroom when he saw A.D. "digging in a laundry basket" that was in the hallway next to her mother's bedroom. According to defendant, A.D. "grabbed [a crack pipe] out of the laundry basket and put it up to her mouth with her left hand, sucking on it while she pretended to have a lighter in her right hand, lighting it and sucking on it . . . like she'd been smoking crack for 20 years." Defendant told Niemeyer, who was in the hallway between defendant and A.D.: "[T]he baby has another crack pipe in her mouth."[2] Niemeyer retrieved the pipe. Defendant called CPS about the pipe incident and then warned

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[2] Defendant's statement that A.D. had "*another* crack pipe in her mouth" apparently refers to a prior incident in "2006, early 2007" when Christine called CPS concerning A.D. getting hold of one of Cadinha's pipes (italics added). CPS provided "instructions on how to prevent that from happening." The record does not reveal what these instructions were.

Christine he had done so. Defendant also called CPS about an incident that allegedly occurred in December 2008. According to defendant, Cadinha "had thrown half an eight ball of crack behind the washing machine."

On December 6, 2008, deputies with the Sacramento County Sheriff's Department went to Niemeyer's mobile home to check on A.D.'s welfare. Cadinha was present when deputies arrived. He was arrested on unrelated misdemeanor warrants for petty theft. Deputies also searched the residence, but found neither drugs nor paraphernalia. Cadinha spent the majority of December in custody. When he was released, Cadinha returned to Niemeyer's mobile home. Niemeyer told defendant to stop calling CPS and asked him to stop spending the night. Defendant "wasn't happy." He told Niemeyer that either "it would be over soon" or "it would blow over." Defendant also stated that "he would take care of the problem himself." On previous occasions, defendant stated he wanted to "hurt" Cadinha and "teach[] him a lesson."

On January 2, 2008, two days before the murder, defendant told Niemeyer that "he had a gun and was going to kill [Cadinha]." The following evening, Niemeyer and Cadinha argued over his ongoing drug use. Cadinha left the mobile home and returned later that night or early the next morning. He crawled into Niemeyer's bed and went to sleep. When Niemeyer left for work at 8:00 a.m. the morning of the murder, Cadinha was still sleeping.

On January 4, 2008, the morning of the murder, defendant drove to Kurt Ures's house in Pollock Pines and picked up Christine, Almeida, A.D., and one of Christine's friends. At the house, defendant told Kurt: "I would like to kill [Cadinha]." When defendant and his passengers reached Niemeyer's mobile home, defendant walked inside to use the bathroom. He did not know Cadinha would be there. On the way to the bathroom, defendant noticed Niemeyer's bedroom door was slightly open and the lights were out in the room. According to defendant, he thought "maybe [Cadinha] was hiding out in there, even though he wasn't supposed to be there." Defendant explained to

detectives after the murder: "I began to wonder if I'm going to get stabbed in the back when I'm trying to pee or get my throat cut or whatever. And [A.D.] is . . . coming in the house in a few minutes. Can't have her around that guy anymore. And then I just snapped and I went in and shot him[,] period."

After shooting Cadinha in the forehead from a distance of no more than two feet, defendant walked out of the trailer, unloaded the gun, placed it on the hood of his car, and called 911. He told the operator he "shot a crack head," and explained: "[H]e's been threatening my [*sic*], calling me on the phone threatening my life. He's dealing crack and smoking crack in the house with [a] little baby and now she knows how to smoke a crack pipe." Cadinha had methamphetamine and cocaine metabolite in his blood at the time of his death. The amounts were .12 milligrams per liter and .78 milligrams per liter, respectively.

Defendant testified in his own defense and claimed he shot Cadinha in self-defense. As mentioned, defendant testified that when he opened the door to Niemeyer's bedroom, he found Cadinha lying in bed watching television. Cadinha "started to rise up" from the bed and "his hand went to his waist." Believing Cadinha was reaching for one of the hunting knives Niemeyer kept by her bed, defendant "feared for [his] life and pulled the gun out and shot." We provide additional portions of defendant's testimony in the discussion that follows. The jury convicted defendant of first degree murder.

DISCUSSION

I

Exclusion of Expert Testimony

Defendant contends the trial court prejudicially erred and deprived him of his constitutional rights to a fair trial, to present a defense, and to due process of law, by excluding expert testimony concerning the effect the levels of methamphetamine and cocaine metabolite present in Cadinha's blood at the time of his death would have on an

average person. We need not decide whether the trial court should have allowed this testimony because any error was harmless.

A.

Additional Background

The prosecution moved in limine to "[e]xclude evidence or testimony about the drugs found in [Cadinha's] blood, or evidence explaining their effect on [Cadinha]." The trial court excluded such evidence from the prosecution's case-in-chief and ruled that "the existence or nonexistence of amphetamines in the system might become relevant if the aggressiveness of the victim were somehow to be made relevant through the defendant's testimony."

Defense counsel then explained the expert she expected to call, Matthew Soulier, M.D., would not be available to testify after defendant's testimony. The trial court stated: "There is no way [Dr. Soulier's] testimony will come in, in this courtroom until after [defendant] testifies because [Dr. Soulier's] testimony won't be relevant until [defendant] sets up the foundational requirements for [Dr. Soulier's] testimony to be relevant." Defense counsel argued: "I completely anticipate my client testifying. I know I cannot bind him, nor can the Court or anyone else, but we were considering taking [Dr. Soulier] out of order with the Court's permission, so that I could have testimony regarding the effects of the drugs that were found in [Cadinha's] system on the average person and what one would expect to see. [¶] This also is relevant on the point of whether or not it is more or less likely that [Cadinha] was asleep at the time he was shot. Because these are stimulant based narcotics. And the amounts in his system, the doctor can extrapolate the effects on the system, which would make it unlikely that someone would be sleeping through that. More likely, that they would be, for lack of a better word, amped up and [a]wake. [¶] I think it's relevant, at least, on that point prior to the defendant testifying as the People still have to prove first degree versus second degree versus anything else."

The trial court responded: "See, my problem is, I understand how you're parsing it and saying the fact that [he has] methamphetamine at whatever levels they are in his body makes the likelihood that he was sleeping, at least, some[what] suspect." Defense counsel interjected: "And cocaine." The trial court continued: "The problem I've got is the more significant aspect of it, that which really makes his testimony potentially useful, is if your client sets up this [self-defense/defense-of-others claim] and then combines it with the fact of the methamphetamine use and the amping up and stuff like that. [¶] There is such a limited usefulness in telling a jury, people on methamphetamine tend to be stimulated. Like, really, people that drink a lot of coffee are stimulated, too. [¶] And without knowing how long it had been since this person had been sleeping, what their normal tolerance was to the drug and all of these other things, the usefulness of knowing levels in his system tells you really nothing. [¶] Somebody could be under the influence of methamphetamine and been on a three-day binge and be sound asleep, so --" Defense counsel again interjected: "I think we would have to have medical testimony about that. I don't think most people would feel that way." The trial court replied: "I tend to disagree. I think that, unfortunately, methamphetamine use or the understanding that it is a stimulant in the extreme is something that has become, unfortunately, very much common knowledge in our society. [¶] And while additional information about methamphetamine use, when you are coupling it with aggressiveness or concerns of self defense and things, I think tends to add heightened importance, it doesn't exist nearly as much until your client gets up and shares whatever it is he intends to share with the jury."

Prior to defendant's testimony, the parties entered into a stipulation, which was read to the jury, that Cadinha had methamphetamine and cocaine metabolite in his blood at the time of his death. The amounts were .12 milligrams per liter and .78 milligrams per liter, respectively.

As mentioned, defendant testified that he shot Cadinha in self-defense. According to defendant, Cadinha had threatened to cut his throat on multiple occasions because he

reported Cadinha's drug use to CPS. These threats prompted defendant to carry a loaded handgun for protection. The morning of the shooting, when defendant walked into Niemeyer's mobile home to use the bathroom, he noticed her bedroom door was slightly open and the lights were out in the room. According to defendant, he thought "maybe [Cadinha] was hiding out in there, even though he wasn't supposed to be there." Defendant opened the door. Cadinha, who was lying in bed watching television, "started to rise up" from the bed and "his hand went to his waist." Believing Cadinha was reaching for one of the hunting knives Niemeyer kept by her bed, defendant "feared for [his] life and pulled the gun out and shot." Defendant also testified about the reasons he made his complaints to CPS, specifically, the incident in which he allegedly "witnessed [Cadinha] selling crack in the front room" of Niemeyer's mobile home, the incident in which defendant found A.D. playing with what he believed to be Cadinha's "crack pipe," and the incident in which Cadinha allegedly "had thrown half an eight ball of crack behind the washing machine."

During a break in defendant's testimony, the prosecutor informed the trial court defense counsel had e-mailed him notes setting forth Dr. Soulier's anticipated testimony.[3] The prosecutor stated he was "having a hard time figuring out" why Dr. Soulier would be taking the stand, explaining: "All he's going to talk about is what the effect of [cocaine] and [methamphetamine] are on a person, generally. [¶] He hasn't done anything with the defendant, and he's not going to talk about the levels that were found in the victim's toxicology. He's not going to talk about what those mean because different people have different opinions on what the weight of toxicology levels are for certain drugs. [¶] If he's going to talk about what cocaine does, what methamphetamine does, one, I don't see the relevance; two, I don't know if that's beyond the common scope of jurors." The trial

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[3] Dr. Soulier's scheduling conflict was apparently resolved.

court and counsel then discussed scheduling. Defense counsel stated that if Dr. Soulier were permitted to testify, his testimony would take "around 20 minutes."

The trial court then stated: "I'm not sure, based upon what your client said occurred, how [Dr. Soulier's testimony] could possibly be relevant. I say that for this reason: According to your client's own testimony, this happened in a mere instance [*sic*]; and, at the most, what this victim did was begin to sit up, which I'm not sure what a doctor could tell us about how a person that moves two feet --" Defense counsel interrupted: "I will try and address it in redirect." The trial court responded: "That will be great. At the moment, I'm not seeing it. [¶] Your client's own testimony is he literally walked in the door. And from the door, upon seeing the victim move a grand total of no more than two feet in an upright position from a laying [*sic*] down position to a partially upright position, he immediately shot him without the victim moving from the bed, moving toward him, doing anything aggressive other than moving his hands from his folded position in the direction of his lap. [¶] So, at this moment, I don't see how it would come in. It is not at all what you would typically find in[,] where cocaine or methamphetamine intoxication would come into a case. [¶] I'm not making a ruling. I'm saying that is my observation of the state of the evidence at the moment. It's not what I expected, quite honestly."

Defendant resumed his testimony following the break. The prosecutor asked defendant how much Cadinha moved forward before he pulled the gun and fired. Defendant answered: "I have absolutely no idea. He started leaning forward and was looking at me. He started leaning forward. His hands went down. And I reached in my sweatshirt, pulled out the gun and shot, because I thought he was going for a weapon." Defendant was then confronted with a statement he made to detectives following the murder, in which defendant said Cadinha "didn't have time" to get up, and he "just straighten[ed] his head back, and that's when [defendant] pulled the trigger." On redirect, defendant acknowledged making the following statement to detectives after the

murder, concerning what was going through his mind when he saw Niemeyer's bedroom door was slightly open: "I began to wonder if I'm going to get stabbed in the back when I'm trying to pee or get my throat cut or whatever. And [A.D.] is . . . coming in the house in a few minutes. Can't have her around that guy anymore. And then I just snapped and I went in and shot him[,] period." Defense counsel asked whether defendant "just snapped" or whether he killed out of fear. Defendant answered: "I don't know. It's probably a combination of all. I had a million things on my mind. Him threatening my life, baby's life is in danger, whether or not he's going to stab me in the back or slit my throat while I'm peeing, if indeed he is in the house." Defendant then testified Cadinha would have been a greater threat to him "[*i*]*f he was high*" because "the drug . . . messes with your mind," but admitted he had no reason to believe Cadinha was under the influence of illegal drugs the morning he was killed (italics added).

Prior to ruling on the admissibility of Dr. Soulier's testimony, the trial court asked defense counsel for an offer of proof. Counsel responded: "[Defendant], in his mind, honestly believes, and there seems to be evidence to support that, through the testimony of all of the witnesses and [Cadinha's] own blood, that he is, in fact, an illicit drug user. . . . [¶] And, as the Court pointed out at the beginning of the case, there is some common knowledge in regards to ingestion of drugs and that these people are sometimes -- these are not your words, mine -- erratic, agitated, et cetera. [¶] Since that is common knowledge, that would be going through my client's mind, even though he is not as articulate as a doctor. [¶] And he did quite succinctly say that repeatedly that [Cadinha] is a crack user from the point of calling 9-1-1, and that was one of the first things out of his mouth. So it must have been forefront in his mind at the time of the offense. [¶] And the doctor would be able to describe how these drugs affect a human system, not specifically [Cadinha], and the associated behaviors with the use of each drug or combination and signs and symptoms that someone is under the influence. [¶] He would not pause it [*sic*: posit] an opinion as to how [Cadinha] himself is acting, but I think this

gives the jury a full picture of what would be going on in the mind of somebody who knows the person in that room, once they realize they are in the room, is a drug user and heightened his fear and need to defend himself, knowing how erratic drug users can be."

The prosecutor responded: "Having recently done a case where meth psychosis was a big portion of the case, my belief is that this is not relevant unless there is some evidence to show that [Cadinha] on this morning was acting in some erratic way that calling an expert would help explain his erratic movement or behavior. We just don't have any of that in the record." Defense counsel clarified: "I'm not seeking to use the expert to explain [Cadinha's] specific actions as described as much as what my client feared based on the fact that he knew [Cadinha] was a drug user and a continual habitual one, based on what [Niemeyer] said and my client has testified to."

The trial court responded: "I actually thought that's what I had written down, and that's what you are offering it for. And for that purpose, there is no way it comes within the doctor's expertise to say what was in your client's mind. [¶] The only person that can possibly shed light on that is your client, and he attempted to through his testimony. [¶] In fact, your client's own testimony is there was nothing that occurred in that room that morning to give him any basis to believe that [Cadinha] was under the influence at that time, not the manner in which he was acting toward him, not the manner he moved, not in anything he observed in the household. In fact, there was nothing at all to suggest that your client had in his mind at all that [Cadinha] was under the influence or using drugs at that time. [¶] The fact of the matter is that the autopsy revealed that [Cadinha] did have drugs in his system, but that can't play into your client's mind-set when your client's own testimony is there is nothing that occurred that caused him to have that in his mind."

Defense counsel further argued: "I also see this proffered evidence similar to that of an antecedent threat. [¶] If I know someone is a drug user on a regular basis and habitually and I believe that, I'm going to be more fearful and react more suddenly

around that person. [¶] So I think having a doctor talk about what these people were normally like when they are under the influence can lend some help in determining why my client felt the need to react so quickly." The trial court responded: "And the appropriate person to have testified to those particular things would have been your client. [¶] So based upon the offer of proof and considering all the testimony that's come in this trial thus far, most specifically, your client's own testimony, I do not believe it supports the type of evidence you offered based upon the reasons you wish to offer it." The trial court excluded Dr. Soulier's testimony on two grounds: (1) "relevance to the particular circumstance"; and (2) under section 352, the trial court found that even if there was "some minimal relevance, it would pale in comparison to the way it might tend to confuse the issues or consume time."

B.

Analysis

"No evidence is admissible except relevant evidence" and, "[e]xcept as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, §§ 350, 351.)[4] Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) Conversely, irrelevant evidence is evidence "having no probative value; not tending to prove or disprove a matter in issue." (Black's Law Dict. (7th ed. 1999) p. 834, col. 2.) The trial court may exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

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[4] Undesignated statutory references are to the Evidence Code.

Rulings under these provisions "come within the trial court's discretion and will not be overturned absent an abuse of that discretion." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070 [section 352]; *People v. Riccardi* (2012) 54 Cal.4th 758, 815 [relevance determinations].) Nevertheless, while "[s]ection 352 permits the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption," this section "requires that the danger of these evils substantially outweigh the probative value of the evidence. This balance is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Tran* (2011) 51 Cal.4th 1040, 1047 ["section 352 requires the exclusion of evidence only when its probative value is substantially outweighed by its prejudicial effect"]; see also *People v. Holford* (2012) 203 Cal.App.4th 155, 168 [section 352 objection should be overruled "unless the probative value is 'substantially' outweighed by the probability of a 'substantial danger'" of one of the statutory counterweights].) Accordingly, "section 352 must bow to the due process right of a defendant to a fair trial and his [or her] right to present all relevant evidence of significant probative value to his [or her] defense. [Citations.] Of course, the proffered evidence must have more than slight relevancy to the issues presented. [Citation.]" (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599; *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

Defendant argues the proffered evidence tended to prove two matters in issue: (1) that Cadinha was awake when defendant walked into Niemeyer's bedroom, rather than asleep as the prosecution alleged; and (2) the actions of a typical user of the drugs found in Cadinha's system "could justify [defendant's] belief and therefore his fear that [Cadinha] was more of a threat due to his drug usage." Defendant claims the trial court abused its discretion in concluding the probative value of this evidence was substantially outweighed by the danger that the evidence would confuse the issues or unduly consume

time. Finally, defendant asserts the erroneous exclusion of this evidence deprived him of his due process right to present a defense.

In support of this argument, defendant relies on *People v. Wright* (1985) 39 Cal.3d 576 (*Wright*). There, our Supreme Court held the trial court erred in excluding evidence that a murder victim had morphine in his system at the time of his death, indicating that heroin had been introduced into his system within the previous 24 hours. The defendant testified he shot the victim after he saw the victim reach toward his back pocket for what the defendant believed was a weapon. (*Id.* at p. 582.) The defendant further stated he believed the victim was acting irrationally and might have been under the influence of a drug. The excluded evidence was offered to show the victim had been under the influence of a narcotic and was therefore more likely to have acted irrationally and aggressively, consistent with the defendant's testimony. (*Id.* at p. 583.) The Supreme Court concluded the excluded evidence had significant probative value because it corroborated the defendant's testimony and also impeached the testimony of the victim's wife, i.e., that the victim had not used heroin for two years, and further contested the prosecution's expert testimony that the victim did not have heroin in his blood at the time of the shooting. On the other hand, the evidence had only minimal prejudicial effect in light of other evidence already before the jury, which showed the victim had used heroin. (*Id.* at pp. 583-585.)

Nevertheless, in *Wright, supra*, 39 Cal.3d 576 our Supreme Court concluded the error in excluding such evidence was harmless. The court explained: "Defendant's offer of proof did not, however, include any proposed testimony concerning the effects of heroin, or the level of morphine contained in the victim's urine, or the significance of any particular level of morphine. Although the excluded evidence would have allowed the jury to infer the victim was under the influence of heroin, this inference would have done little towards corroborating defendant's testimony that the victim was, as a result, irrational and aggressive. In fact, the only testimony as to how the victim behaved when

under the influence of heroin was that of his wife, and she stated unequivocally that when he was under the influence he was never violent or aggressive but instead was prone to 'sleep a lot.'" (*Id*. at p. 585.) The court further explained that "the excluded evidence was offered in support of a claim of irrationality that was itself weak and unpersuasive. The sole direct evidence that the victim was behaving 'irrationally' was the following brief, leading, and self-serving exchange on redirect examination of defendant: [¶] 'Q. [by defense counsel]. Did you feel that [the victim] was acting rationally or irrationally? A. Irrationally. [¶] 'Q. Did you feel he might have been under the influence of some sort of drug? A. Yes.'" (*Id*. at pp. 585-586.) Finally, the court pointed out that "there was significant evidence introduced against defendant that belied his claim of self-defense: he admitted to the police that he shot the victim without hesitation four times just 'like Wyatt Earp'; the testimony of several witnesses contradicted defendant's assertion that the victim threatened him; and no weapon was found on or near the victim's body." (*Id*. at p. 586.)

Here, unlike *Wright*, *supra*, 39 Cal.3d 576, where the excluded evidence would have revealed the victim had morphine in his system at the time of his death, the jury in this case was informed that Cadinha had methamphetamine and cocaine metabolite in his system when he was killed. In *Wright*, the excluded evidence would have corroborated the defendant's testimony that he believed the victim was acting irrationally and may have been under the influence of a drug, and would also have contested the testimony of key prosecution witnesses. Here, defendant did not testify that he believed Cadinha was acting irrationally and might have been under the influence of a drug. On the contrary, as the trial court pointed out, defendant testified that he had no reason to believe Cadinha was under the influence of drugs the morning of the murder. Defendant did testify Cadinha was a habitual drug user, as did Niemeyer and Christine. And the parties' stipulation regarding the presence of methamphetamine and cocaine metabolite in his system corroborated this testimony. The question in this case is whether, in addition to

the levels of these substances found in Cadinha's system, the trial court should have admitted expert testimony concerning how these drugs affect an average user.

The trial court ruled such evidence to be irrelevant. We disagree. The fact that Cadinha had stimulants in his system when he was shot tends to make it somewhat more likely Cadinha was awake when defendant came into Niemeyer's room, and not asleep as the prosecution theorized. While the jury received evidence that Cadinha had methamphetamine and cocaine metabolite in his system, it was not informed of the significance of this evidence, i.e., these substances are stimulants. Moreover, the offer of proof was that the expert would testify these drugs tend to make a person erratic or agitated. The fact that an average user would be erratic or agitated tends to make it more likely that Cadinha acted erratically or became agitated when defendant entered the room, which would tend to make defendant's testimony that Cadinha began to sit up and reached quickly towards his waistband more likely.

However, as mentioned, section 352 allows a trial court to exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The trial court ruled that the probative value of the proffered evidence was substantially outweighed by the probability its admission would necessitate undue time consumption and create a danger of confusing the issues. We need not decide whether the trial court erred in this regard because any error was manifestly harmless.

Although the proffered evidence would have corroborated, at least to some extent, defendant's testimony Cadinha was awake when he entered Niemeyer's bedroom, this testimony was contradicted by the following evidence. The forensic pathologist testified that when she viewed the crime scene, Cadinha was lying on Niemeyer's bed "in a reclined position on several pillows. No shoes or socks on. He had his hands loosely folded on his lap area. And also on his lap . . . there was a TV monitor [*sic*: remote] and

a cell phone." Cadinha had a gunshot wound to the right side of his forehead and "gunpowder stippling surrounding the wound that was embedded in [Cadinha's] skin," indicating the gun was fired from a distance of "two inches away from the skin to approximately two feet away." The pathologist further testified there was no evidence to indicate Cadinha "was leaning forward when he was shot." Niemeyer testified Cadinha was asleep at 8:00 a.m. when she left for work. Rowland and Wheeler were watching a football game in the living room the morning of the murder. Rowland testified he did not believe anyone else was in the mobile home because he did not hear anyone else moving around. Nor did he hear a TV on in any other part of the house. While the TV was on in Niemeyer's bedroom, the sound was muted. Defendant also testified the lights were out in the bedroom. In light of the foregoing evidence, even had the jury been told of the stimulating qualities of the substances found in Cadinha's system, it is extremely unlikely the jury would have believed Cadinha was awake and watching TV when defendant entered the bedroom. And if the jury disbelieved Cadinha was awake, it makes absolutely no difference that methamphetamine and cocaine metabolite might have made him more prone to agitation and erratic behavior had he been awake.

Finally, defendant's own statements provide strong evidence he did not kill Cadinha in self-defense, but instead formed the intent to kill prior to entering the bedroom. Two days before the murder, he told Niemeyer that "he had a gun and was going to kill [Cadinha]." The morning of the murder, he told Kurt: "I would like to kill [Cadinha]." Immediately after shooting Cadinha in the forehead, he told the 911 operator he "shot a crack head," not because Cadinha did anything that caused him to fear for his safety that morning, but because: "[H]e's been threatening my [*sic*], calling me on the phone threatening my life. He's dealing crack and smoking crack in the house with [a] little baby and now she knows how to smoke a crack pipe." And when defendant talked to detectives about the murder, he confirmed he decided to kill before entering the bedroom: "I began to wonder if I'm going to get stabbed in the back when I'm trying to

pee or get my throat cut or whatever. And [A.D.] is . . . coming in the house in a few minutes. Can't have her around that guy anymore. And then I just snapped and I went in and shot him[,] period."

Assuming, without deciding, that the trial court should have allowed the proffered expert testimony, we find any error to have been harmless.

II

Instructional Error

Defendant also claims the trial court prejudicially erred and violated his constitutional rights by instructing the jury with CALCRIM No. 3472 on the concept of contrived self-defense. He is mistaken.

CALCRIM No. 3472, as delivered to the jury in this case, provides: "A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force." The trial court found this instruction was supported by the evidence, explaining: "There is a fact or some indication, at least within the reasonable interpretation of this jury, that the defendant at some point contemplated, perhaps, putting himself in a situation where self-defense might be an appropriate way to address his dispute or displeasure or unhappiness or anger or however one wants to characterize it, toward [Cadinha], the ultimate victim in this case. [¶] And I believe that there is sufficient evidence to allow the jury to consider what the import of [CALCRIM No.] 3472 is because it falls within a reasonable interpretation of the facts of this case."

"'A trial judge's superior ability to evaluate the evidence renders it highly inappropriate for an appellate court to lightly question his [or her] determination to submit an issue to the jury.'" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381.) Here, during defendant's testimony, he denied telling Kurt he wanted to kill Cadinha on the morning of the murder. Defendant also denied telling Kurt that "if [he] could kill [Cadinha] in self-defense, [he] would do it in a heartbeat." Defendant was then confronted with his statement to detectives, in which he denied telling Kurt that he was

going to kill Cadinha, but admitted making the statement: "I would shoot [Cadinha] in self-defense, but that's it." Shortly after making this statement, defendant drove to Niemeyer's mobile home, walked into her bedroom, found Cadinha in bed, and shot him in the forehead. While the physical evidence indicated the gun was no more than two feet from Cadinha's forehead when defendant pulled the trigger, defendant testified he was in the doorway, between six and eight feet away, and he fired the gun in self-defense, believing Cadinha was reaching for a hunting knife. We agree with the trial court's assessment that this evidence supported the giving of CALCRIM No. 3472. If defendant's account of Cadinha's actions the morning of the murder were believed, the jury could have concluded, based on defendant's statement immediately before the murder, i.e., he "would shoot [Cadinha] in self-defense," that defendant entered Niemeyer's bedroom with a loaded gun in order to provoke a fight and thereby create an excuse to use force. The trial court did not err in instructing the jury with CALCRIM No. 3472.

Moreover, even if CALCRIM No. 3472 was not supported by the evidence, we would find no reasonable likelihood its inclusion in the instructions misled the jury. The jury was specifically instructed: "Some of these instructions may not apply, depending on your finding of the facts. Do not assume just because I gave a particular instruction that I'm suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." CALCRIM No. 3472 applies only where the defendant "provokes a fight or quarrel with the intent to create an excuse to use force." If, as defendant contends, there was no evidence he did so, then there is no reason to believe the jury relied on this instruction in finding him guilty. As our Supreme Court has observed, an instruction correctly stating a principle of law but not applicable to the facts of the case is usually harmless, having little or no effect "other than to add to the bulk of the charge." (*People v. Sanchez* (1947) 30 Cal.2d 560, 573.)

III

Prosecutorial Misconduct

Defendant further asserts his constitutional rights were violated when the prosecutor, during closing argument, told the jury the coroner had concluded Cadinha was "seemingly asleep" at the time defendant shot him in the forehead. This contention is forfeited by defendant's "failure to timely object and request an admonition." (*People v. Clark* (2011) 52 Cal.4th 856, 960; *People v. Cole* (2004) 33 Cal.4th 1158, 1201 ["a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety"].)

Anticipating forfeiture, defendant asserts his trial counsel was ineffective for failing to object to the prosecutor's comment and request an admonition. "'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his [or her] "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he [or she] must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'" (*In re Harris* (1993) 5 Cal.4th 813, 832-833; see also *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].)

We conclude the prosecutor's comments did not amount to misconduct. Thus, defense counsel's failure to object was reasonable and there was no conceivable prejudice. Defendant's argument that "the prosecutor's comments present a 'classic' case of misstating the evidence presented at trial since there is simply no evidence that the coroner testified that [Cadinha] was 'seemingly [asleep]' when he was shot" is belied by the record. As we have explained, when asked to describe her observations of Cadinha at

the crime scene, the forensic pathologist testified: "Cadinha was inside of the trailer. There were two bedrooms. . . . [¶] He was in a makeshift second bedroom on the left-hand side as you walked through the living area, which also had a sofa -- no, excuse me, it had a mattress in it as well. [¶] And there was a washer and dryer against the wall in the room where he was sleeping, but also a bed against the very back wall. A TV was mounted up on the wall, and [Cadinha] was laying [*sic*] in a bed that was against the back of the wall in a reclined position on several pillows. No shoes or socks on. He had his hands loosely folded on his lap area. And also on his lap I recall there was a TV monitor [*sic*: remote] and a cell phone." The pathologist then testified that Cadinha had a gunshot wound to the right side of his forehead and "gunpowder stippling surrounding the wound that was embedded in [Cadinha's] skin," indicating that the gun was fired from a distance of "two inches away from the skin to approximately two feet away." The pathologist further testified there was no evidence to indicate Cadinha "was leaning forward when he was shot." A fair characterization of this testimony is that the pathologist described Cadinha as being seemingly asleep at the time he was shot. Indeed, the pathologist referred to the crime scene as "the room *where he was sleeping*." (Italics added.) And when defendant was asked whether he heard the pathologist testify Cadinha was "seemingly sleeping," defendant answered: "That is correct."

Moreover, as previously explained, there was additional evidence that strongly suggested Cadinha was asleep when defendant entered the bedroom and shot him in the forehead. "Closing argument presents a legitimate opportunity to argue all reasonable inferences from evidence in the record." (*People v. Adcox* (1988) 47 Cal.3d 207, 235.) For the foregoing reasons, we reject defendant's claim that the prosecutor's argument misstated the evidence.

IV

Cumulative Prejudice

Finally, defendant contends the cumulative prejudice arising from the foregoing assertions of error requires reversal. As we have explained, assuming the trial court erred in preventing the proffered expert testimony, there was no prejudice. Having found no other error, defendant's assertion of cumulative prejudice must also fail. (See *People v. Dement* (2011) 53 Cal.4th 1, 58.)

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

BLEASE, Acting P. J.

NICHOLSON, J.